SUPREME COURT, U. S.

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NO. 616

IN THE

Supreme Court of the United States

October Term, 1969

ROBERT L. HATCHETT, JR.

v.

C. W. WILLIAMS

Reply to Petition for Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes C. W. Williams and files this Reply to the Petition for Writ of Certiorari on file.

QUESTION PRESENTED

(1) The first question presented in the Petition for Writ of Certiorari, if accurately stated in the context of the case is whether the contract between Respondent Williams and Corky's Hong Kong Clothes, Inc. (Corky's) (Statement of Facts, pp. 6-16) is violative of the anti-trust laws of the United States and assuming such a vio-

lation, whether the guaranty agreement executed by Petitioner (Statement of Facts, pp. 59-66) was unenforceable.

(2) The second question presented in the Petition for Writ of Certiorari, if accurately stated in the context of the case is whether the decision under review is in conflict with the principles established by this Court in *Simpson v. Union Oil of California,* 377 U.S. 13 (1964).

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not present with accuracy, brevity, and clearness that which is essential to a ready and adequate understanding of the points requiring construction as required by Rule 23, paragraph 4, and is not free from burdensome irrelevant, immaterial, and scandalous matter as required by Rule 40 of the Rules of this Honorable Court. The opinion of the Texas Court of Civil Appeals contains a full statement of all of the material facts. Some of the pertinent portions of the record will be dealt with under specific points in the argument in this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

(1) The Texas Court of Civil Appeals correctly held that Petitioner failed to establish that the contract between Respondent and Corky's Hong Kong Clothes was violative of the anti-trust laws of the United States.

(2) Petitioner may not assert the invalidity of the contract under the Sherman Act as a defense to the suit on the Guaranty Agreement.

(3) The judgment of the Trial Court and the judgment of the Court of Civil Appeals are correct and sustainable on still other grounds.

(4) The decision under review is not in conflict with the principles established by this Court in *Simpson v. Union Oil of California,* 377 U.S. 13 (1964).

ARGUMENT

I.

THE DECISION OF THE COURT OF CIVIL APPEALS THAT PETITIONER FAILED TO ESTABLISH THAT THE CONTRACT BETWEEN RESPONDENT AND CORKY'S VIOLATED THE ANTI-TRUST LAWS IS CORRECT.

A.

Since the decision under review forecloses all issues within the final jurisdiction of the Texas Courts including the construction of Texas Statutes, the validity in Texas of "conditionally delivered" instruments of guaranty, and similar issues, this brief does not purport to reply to these issues though they may be collaterally raised by the Petition.

B.

The contract between Corky's Hong Kong Clothes, Inc., and Respondent, Williams, was dated October 7, 1964, and executed in Caddo Parish, Louisiana. Prior to October, 1964, Corky's was engaged solely in the sale of tailor-made Hong Kong suits. The Petitioner served as a member of the board of directors of Corky's and owned

(in connection with a family group known as "Hatchett and Hatchett") approximately thirty (30%) percent of the outstanding corporate stock of the company. Corky's wanted to obtain ready-made Hong Kong suits but did not have financing to obtain ready-to-wear inventory. The relevant provisions of this agreement are set forth verbatim in the opinion of the Court of Civil Appeals at 437 S.W.2d at 336-337.

In summary, under the terms of the contract, Respondent agreed to purchase and to place for sale in Corky's Shreveport, Louisiana store tailored ready-to-wear suits, coats, and similar items. The clothes were to be purchased by the Respondent after being located by Corky's in Hong Kong and in other places, and Corky's was responsible for the negotiation of the price and the terms of the sale. Once a selection had been made by Corky's which met with Respondent's approval, Williams paid the manufacturer or tailor directly and had the merchandise transported to the Shreveport store paying all shipping costs and custom charges.

Title to the merchandise was specifically stated to remain in Respondent. The clothes were placed in Corky's Shreveport store for sale on a consignment basis with the payment of the costs, shipping charges, and customs tariffs on the clothes (designated in the agreement as the "gross cost" of the clothes) being made by Corky's to Williams only after the merchandise was sold by Corky's to customers or after the purchase of the merchandise by Corky's under other provisions of the agreement. Respondent retained the right to enter the store and inventory the clothes from time to time, to call on Corky's for security for the merchandise, and under certain circumstances to

enter and remove the merchandise from the premises of the store without payment to Corky's.

The right to fix and determine the retail sales price of the merchandise was expressly given to Corky's but upon a sale of the merchandise to a customer, Respondent was to immediately receive from Corky's his "gross cost" plus fifty (50%) percent of the difference between the gross cost and the selling price (referred to in the agreement as the "mark-up"); and Respondent was never to receive an amount less than his gross cost plus ten (10%) percent. Corky's could sell the merchandise at any price it chose, but upon any sale of the merchandise to a customer, it was obligated to pay Williams the cost of the merchandise (gross cost) plus at least ten (10%) percent of the gross cost.

Respondent furnished merchandise to Corky's Shreveport store until February, 1965, when the principals of Corky's decided to close the store in Shreveport, Louisiana, and requested that Respondent Williams, allow the movement of his merchandise to other of Corky's stores in Dallas, Texas, and elsewhere. Before he would allow the movement of any of his inventory, Williams requested that Corky's furnish him an *acceptable guaranty not guaranteeing the performance of Corky's obligations under the 1964 contract but only guaranteeing repayment of the "gross cost" of Respondent's merchandise.* Petitioner, Hatchett, on or about February 9, 1965, executed such a guaranty agreement to the extent of $17,772.78; that amount being the gross cost of Williams' merchandise at that time on hand in the store in Shreveport, Louisiana.

Petitioner asserted both in the Court of Civil Appeals and in his Application for Writ of Error before the Texas

Supreme Court that the contract between Corky's and Respondent violated Section 1 of the Sherman Act, 15 U.S.C. §1 (1964), thus rendering the guaranty agreement unenforceable. However, Petitioner acknowledges that he introduced "no evidence in the trial court that the contract was unreasonable" (Petition, p. 5) nor did Petitioner offer any evidence or request any issues be submitted to the jury concerning the necessity or reasonableness under the circumstances of any restraints, the type and effect of any such restraints, economic evidence, etc.

It requires no citation of authority that absent a "per se" violation of the Sherman Act, there must be an "unreasonable restraint" to constitute a violation of Section 1. *Apex Hosiery Co. v. Leader,* 310 U.S. 982 (1940); *Standard Oil Co. v. United States,* 221 U.S. 1 (1910).

In passing upon the question of *unreasonable restraint,* all the circumstances surrounding the alleged agreement or combination are to be taken into account and while the standard of conduct is in its nature and theory a question of law, where the facts are in dispute, the question will obviously be one for the jury to decide. *U. S. v. Whiting,* 212 Fed. 466 (Dist. Ct. Mass., 1914); 24 C.J.S. Monopolies, P. 990.

Rule 279, Texas Rules of Civil Procedure provides:

> . . . Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived. . . .

Thus the Court of Civil Appeals correctly concluded that the Petitioner by his failure to offer any evidence other than the terms of the contract or to request that

issues be submitted to the jury had waived all but "per se" violations of Section 1.

The Court of Civil Appeals was equally correct in concluding at 437 S.W.2d 339:

> . . . We have noted that the original contract did not provide for Williams to fix the price of the merchandise. We find no violations of the act on the face of the original contract. . . .

When the terms of the contract are considered either apart from or together with all of the testimony of the parties, the conclusion is compelling that this agreement did *not* fix the minimum price at which the merchandise must be resold to the public, and thus could not in any event constitute a per se violation of the Federal Statutes.

The terms of the contract provided that Williams would purchase the merchandise and place it in the Shreveport store where the merchandise would remain the property of Williams until it was *sold* to customers or purchased by Corky's as provided in the contract (paragraph 4). *Corky's was to make no payment whatsoever for the clothes until they were sold to customers or purchased by Corky's under other provisions of the agreement.*

On the day following the sale of each item, Corky's was obligated to deposit in the First National Bank in Shreveport to Williams' account an amount equal to the gross cost of the clothes plus fifty (50%) percent of the mark-up (retail price minus gross cost) of each item sold (paragraph 8).

It was provided that ". . . (7) *Corky's shall have the exclusive right to fix and determine the price at which*

each item shall be sold. . ." and that without the aprroval of Williams the mark-up would not be less than twenty (20%) percent of the gross cost (paragraph 7). Clearly the reasonable construction of paragraphs 7 and 8 of the contract was that the merchandise was to remain the property of Williams until it was sold to customers or purchased by Corky's; that Corky's had the *exclusive right* to set the sales price; that the day following the sale, Corky's was to pay Williams for the merchandise sold; that Williams would receive from Corky's perhaps more but not less than the amount of his gross cost plus ten (10%) percent (Williams was to receive fifty (50%) percent of the *"mark-up"* which was defined to be twenty (20%) percent of the gross cost of the merchandise).

Thus, Williams was assured of receiving in payment for his merchandise his gross cost plus ten (10%) percent (one-half of the defined twenty (20%) percent mark-up). Corky's was free to sell at any price it chose, but Corky's set the price knowing that Williams was entitled to receive as a minimum his gross cost plus ten (10%) percent; and if the actual sales price as determined by Corky's exceeded the gross cost plus twenty (20%) percent; of course, Williams was entitled to half of the mark-up.

The provisions of paragraphs 7 and 8 did no more than set the minimum price which Corky's had to pay *Williams* upon a sale of the consignment merchandise, and these provisions do not constitute the "pegging of a minimum retail price to the consumer" nor attempt to achieve "uniform retail price maintenance." These provisions have no more effect on the retail price of the merchandise than if Williams had made an outright sale

to Corky's and had set the wholesale price at his gross cost plus ten (10%) percent. In that instance, Corky's would also have been free to sell to the consumer at any price it selected; but there would be a strong business incentive to set the price higher than the gross cost plus ten (10%) percent or otherwise Corky's would fail to make a profit.

Respondent would submit that the language of paragraphs 7 and 8 of the contract, while not crystal clear, is reconcilable and indicates only the minimum price which Respondent was to receive from Corky's on a sale of the merchandise. However, assuming for the purposes of argument, that the provisions of the contract are so ambiguous that they cannot be reconciled and that it is necessary to look to the intention of the parties; it requires only a *cursory* review of the testimony to reveal that "retail price maintenance" was not involved in the intentions, business objectives, or conduct of the parties.

C.

The Contract between Respondent and Corky's was one of "consignment" and therefore no combination in restraint of trade was possible under the facts of the instant case. The Contract gave the Respondent, the right to furnish merchandise to be sold in the Corky's store in Shreveport, Louisiana, with the exception of the made-to-measure items (paragraph 1). The purchases were to be made by Williams at such places and on such terms as were agreeable to Corky's. Williams was to ship the merchandise to Corky's Shreveport store and pay all shipping costs and customs tariffs or charges (paragraph 2). After arrival the items were to be inventoried and

the Respondent's *cost on each item was to include the customs charges and its proportionate part of the shipping charges* (all of which were defined as the "gross costs") (paragraph 3).

The agreement specifically stated ". . . (4) The merchandise will remain the *property of Williams* until sold to customers or purchased, as hereinafter provided, by Corky's. . ." Corky's had the exclusive right to select the merchandise, to negotiate the terms (paragraph 6), and to fix and determine the price at which each item would be sold to the customer; but the agreement provided that upon a sale of the merchandise to a customer regardless of the price, Corky's would be liable to Williams for at least his gross cost plus ten (10%) percent.

The contract further provided that as to merchandise which was purchased by Corky's from Williams under the ninety (90) day provision of the contract, the sales price would be at the sole discretion of Corky's. This provision being predicated upon the assumption that Corky's would pay Williams for the merchandise either at the time the merchandise was sold to a customer or, as to the merchandise which he kept in his inventory for ninety (90) days, Corky's would pay Williams if and when it was purchased under the ninety (90) day provision in the agreement. The agreement provided that Corky's was to furnish Williams a daily list of items sold, together with the gross cost and mark-up on each item, sales slip, and bank deposit showing that part of the sale due to Williams (paragraphs 7 and 8). It provided that upon the request of the Respondent, Corky's would purchase and immediately pay for any items which it received from Williams more than ninety (90) days prior to the demand and

which remained in its possession and had not been sold to a customer. The contract gave Williams the right to remove any merchandise which remained in the store in excess of ninety (90) days and which had not been sold and the right to inventory all merchandise which he had placed in the store at any and all reasonable times. In the event of filing of a bankruptcy petition, Respondent had the right to remove any and all of his unsold items without payment from Corky's premise. In the event that the Respondent was reasonably apprehensive that the merchandise placed in Corky's store was in jeopardy from the claims of creditors or from poor management, he was given the right to call upon Corky's for acceptable security, and in the event that Corky's failed to furnish such security, Williams had the right to remove his merchandise from the store (paragraph 10).

Clearly the terms of the contract provided for the placing of inventory by Williams in Corky's Shreveport store on a "consignment basis" with Williams retaining title to the merchandise until it was either sold to a customer or, in the event the merchandise was unsold and remained in Corky's possession after ninety (90) days, Williams could at that time make the demand that Corky's purchase the merchandise under the terms of the agreement. Certainly it is not required for validity of a consignment contract that the consignee be allowed to indefinitely retain possession of merchandise without payment to the consignor; and the provisions in the agreement providing that the merchandise still remaining in the posession of Corky's after ninety (90) days could at the option of Williams be required to be purchased by Corky's or the fact that the sales were made by Corky's

in its name, rather than in Williams' name, would not invalidate the consignment.

It is clear from the testimony of the parties to the contract that they considered the agreement between Corky's and Respondent, Williams, to be one of "consignment." David Hatchett, the secretary of Corky's Hong Kong Clothes, Inc., and the brother of Petitioner, testified ". . . the corporation at that time had intended to involve itself only in tailor-made clothes. A decision was reached, due to a lack of sale and other problems inherent in the tailor-made business, to go into the ready-made business, which was the primary reason for Mr. Jackson's obtaining the guarantee, or the financing from Mr. Williams and his son." (p. 248, S.F.) A. L. "Corky" Jackson, president of Corky's Hong Kong Clothes, Inc., testified ". . . This was merchandise that we had on *consignment* for Mr. C. W. Williams. . ." (Emphasis added.) (p. 279, S.F.) From the entire testimony of the Respondent, Mr. C. W. Williams, it is apparent that he considered the merchandise located in Corky's store in Shreveport, Louisiana, to be his merchandise.

Not only under the terms of the Contract could merchandise be returned to Respondent within specified periods, but under the provisions of paragraph (c) of the guaranty executed by Petitioner (Petition, Appendix "D", p. 39), the Petitioner could return the merchandise to Williams and relieve himself of the obligations under the guaranty agreement.

Thus, even if the contract terms should be construed to peg a minimum retail price, the "consignment nature" of the transaction would eliminate the "per se" violation. Petitioner acknowledges the legitimacy of such contractual

provisions in true consignment cases. *United States v. General Electric Company,* 272 U.S. 476 (1926) (Petition p. 7). However, the application of the "consignment exception" to the Sherman Act is not reached unless the contract itself is construed to provide for retail price maintenance.

D.

PETITIONER MAY *NOT* UTILIZE THE POSSIBLE VIOLATION OF THE SHERMAN ACT BY THE CONTRACT TO AVOID LIABILITY WHERE ENFORCEMENT OF THE GUARANTY AGREEMENT WOULD NOT RESULT IN ENFORCEMENT OF A VIOLATION OF THE SHERMAN ACT.

Petitioner was a stockholder and director of Corky's when he executed the guaranty agreement (Petition, Appendix "D", pp. 37-41) on February 9, 1965 to induce Respondent to allow his goods to be removed from Shreveport, Louisiana, in order that Corky's could open another store in Dallas, Texas. It is undisputed that when the guaranty was executed, Corky's was on the brink of financial disaster and it was certainly of benefit not only to Corky's but to Petitioner for the clothes to be moved to the Dallas store.

As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not been favored by this Court. In *Kelly v. Kosuga,* 358 U.S. 516 (1959), a purchaser of several car loads of onions in defense to an action by the seller for failure to complete payment of the purchase price asserted that

the basic contract violated the Sherman Act. In striking the defense, Justice Brennan stated:

> . . . As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. . .
>
> . . . the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction . . . citing *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165.

Respondent respectfully submits that *Kelly v. Kosuga* is directly in point with the facts of the decision under review and is controlling. See also *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1901).

II.

THE JUDGMENT OF THE TRIAL COURT AND THE JUDGMENT OF THE COURT OF CIVIL APPEALS ARE CORRECT AND SUSTAINABLE ON STILL OTHER GROUNDS.

At the time the guaranty agreement was executed by Petitioner, it is undisputed that the gross cost of Respondent's merchandise in the possession of Corky's totaled $17,772.78. Before agreeing to allow the removal of the merchandise from Shreveport, Respondent requested a guaranty agreement *not* guaranteeing the performance of Corky's obligations under the previous contract but guaranteeing that if the goods were removed from Shreveport that Petitioner would act as a surety for the "gross cost" of Respondent's goods. (Petition, Appendix "D", pp. 37-41).

C. W. Williams, Jr., testified that after February 9, 1965, as the few remaining payments were made, the gross cost of each item sold was used to reduce the gross cost of the inventory guaranteed by the Petitioner, and that the balance of the gross cost for which Respondent had not been paid on July 27, 1965, when demand was made on Petitioner under the terms of the guaranty agreement, was $15,030.69 (pp. 90-92, S.F.).

It is undisputed that Petitioner, guarantor, made no attempt to return the clothes within 120 days of the execution of the guaranty agreement. Thus, the liability of Petitioner is in no way dependent upon the validity of the contract between Williams and Corky's, as Petitioner had agreed to reimburse the Respondent for the *gross cost* of Williams' merchandise which was then in possession of Corky's. Consequently, Hatchett cannot raise the possible illegality of that contract as a defense to liability on the guaranty agreement.

It is the settled rule in Texas that *a third person cannot raise the defense of illegality nor can illegality constitute any defense where the plaintiff does not require aid from the illegal transaction in order to establish a right to recover.*

The Texas Supreme Court in *Morrison v. City of Fort Worth,* 155 S.W.2d 908 (1941), stated that it was the "settled rule in the State that even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff required no aid from the illegal transaction to establish his case." In *Sharp v. Beacon Oil & Refining Co.,* 108 S.W.2d 870 (Tex. Civ. App., 1937, writ dism'd), the Court again restated the test:

> "The test for determining whether a demand connected with an illegal act can be enforced is whether the person seeking to enforce it requires any aid from the illegal transaction to establish his case. No recovery can be had if it is necessary for the plaintiff to prove, as part of his cause of action, his own illegal transaction. *But the plaintiff may recover if he can show a completed cause of action without being obligated to prove his own illegal act, although such act may incidentally appear, and may be explanatory even of other facts in the case, it being sufficient if his clause of action is not essentially founded upon something which is illegal.*" (Emphasis added.)

It is undisputed that in order to induce Williams to allow his goods to remain in the possession of Corky's and to allow their removal from Shreveport, Louisiana, and his immediate control, Hatchett guaranteed the reimbursement to Williams of *his costs* for the clothes, including the shipping and customs charges (gross cost). The guaranty agreement was not dependent on any contract between Williams and Corky's, but it simply guaranteed the reimbursement of the cost of Williams' merchandise located in Corky's Shreveport store in return for his agreement to allow removal of the merchandise.

The liability of Petitioner is in no way dependent on the October, 1964 contract between Corky and Respondent. In *Herb v. Pitcairn,* 324 U.S. 117, at p. 125-126 (1945) Justice Jackson stated:

> . . . This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

The decision under review is an appropriate case for the limitation of review by Writ of Certiorari as there is clearly an independent ground upon which to sustain the judgment of the Court of Civil Appeals.

III.

THE DECISION UNDER REVIEW IS NOT IN CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT IN SIMPSON V. UNION OIL OF CALIFORNIA.

Whether the Contract between Respondent and Corky's is characterized as a contract of consignment or as a contract of sale, for the reasons previously stated the contract did not provide for the "pegging of a minimum retail price to the consumer" nor was it an attempt to achieve "uniform retail price maintenance," thus the instant case could in no event be in conflict with Section 1 of the Sherman Act or with *Simpson v. Union Oil.*

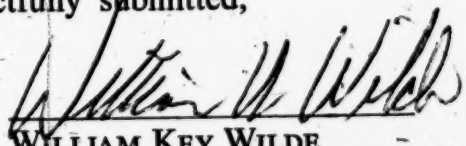
In *Simpson,* Union Oil Company of California utilized a "coercive type of consignment" agreement between the company and approximately 3,305 service station operators in eight western states specifically and only for the express purpose of allowing Union to control the retail price of gasoline. If a dealer sold gasoline below the fixed price, his one year consignment agreement was not renewed. Certainly the decision under review and Simpson are distinguishable on their respective facts—Petitioner is not one of 3,305 individuals damaged by a coercive price fixing scheme but is in fact a stranger to the transaction which he alleges to be illegal; nor is the decision under review an action to recover treble damages by a

person authorized to bring such an action under the provisions of the Sherman Act.

PRAYER

For these reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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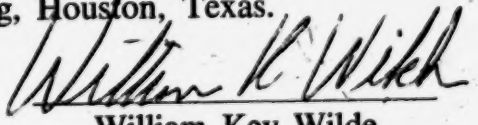
PROOF OF SERVICE

I, WILLIAM KEY WILDE, attorney for Respondent herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 17 day of October, 1969, I served copies of the foregoing Reply To Petition for Writ of Certiorari to the Supreme Court of Texas on Petitioner, Robert L. Hatchett, Jr., by delivering copies to Moore & Morris, Attorneys for Petitioner at 340 San Jacinto Building, Houston, Texas.



William Key Wilde

APPENDIX

Vernon's Ann. Rules Civ. Proc., rule 279.

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be

deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.